Supreme Court, U. S.
FILED
APR 27 1978
MICHAEL RODAK, JR., CLERK

No. 77-1368

In the Supreme Court of the United States

OCTOBER TERM, 1977

JAMES HAROLD DONDICH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1368

JAMES HAROLD DONDICH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner claims he received ineffective assistance from counsel appointed to represent him before trial, from retained trial counsel, and from retained counsel on appeal.

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted of wire fraud, in violation of 18 U.S.C. 1343 (Count III); causing a person to travel in interstate commerce in order to defraud him, in violation of 18 U.S.C. 2314 (Count IV); receipt and disposition of stolen property transported in interstate commerce, in violation of 18 U.S.C. 2315 (Count V); misapplication of funds held by a federally insured bank, in violation of 18 U.S.C. 656

(Count VII);[1] four counts of interstate transportation of property obtained by fraud, in violation of 18 U.S.C. 2314 (Counts IX-XII); and conspiracy to commit these offenses, in violation of 18 U.S.C. 371 (Count I). He was sentenced to four years' imprisonment on Counts I, IV, and V and two years' imprisonment on each of the remaining counts, all to be served concurrently, and was fined a total of $70,000. The court of appeals affirmed his conviction on each count except for Count III, which it directed the district court to dismiss (Pet. App. A6).

During May 1975, Robert Ornstein was appointed by the district court pursuant to 18 U.S.C. 3006A to represent petitioner. Shortly thereafter, Ornstein discovered that petitioner was not indigent and therefore did not qualify for appointment of counsel. On July 1, 1975, Ornstein informed petitioner that he could not represent him as court-appointed counsel, that petitioner would have to retain private counsel, and that he "would undertake no effort whatsoever until [he] was informed by [petitioner] as to what he wanted [counsel] to do" (Tr. 202). He also advised petitioner to act quickly because the trial was scheduled for August 19, 1975 (Tr. 201). Petitioner told Ornstein that he would contact him the following week, but he failed to do so, and Ornstein's repeated efforts thereafter to reach petitioner were unsuccessful (Tr. 201-202).

On August 1, 1975, the district court granted Ornstein's motion to withdraw as counsel. Carl Stewart was substituted as retained counsel, and the trial was continued, with the acquiescence of Stewart, until September 23, 1975 (Tr. 214). On appeal, petitioner

---

[1]Upon the government's motion, Count VII was dismissed before sentencing (Tr. 11,067-11,068).

retained Phillip Stein, a co-defendant who had been acquitted at trial and who had also been petitioner's attorney in certain matters before this case.

Petitioner's sole claim in this Court is that all three counsel who represented him below were ineffective. That claim is without merit. The representation petitioner received was well "within the range of competence demanded of attorneys in criminal cases." *McMann* v. *Richardson*, 397 U.S. 759, 771. In addition, we note that petitioner's claims concerning the ineffectiveness of his trial counsel were raised neither in the district court, where they could most appropriately have been considered by the judge with first hand knowledge of the situation (*United States* v. *DeCoster*, 487 F. 2d 1197, 1204-1205 (C.A.D.C.)), nor in the court of appeals. Because of this unexplained failure to raise the claims below, they are not properly before this Court. *United States* v. *Lovasco*, 431 U.S. 783, 788 n. 7; *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n. 2; *Lawn* v. *United States*, 355 U.S. 339, 362-363 n. 16.

1. Petitioner's claim that Ornstein was ineffective because he did not file any pretrial motions or pursue normal discovery, even if true, does not establish that petitioner was deprived of effective assistance of counsel at trial. Petitioner makes no showing that his court-appointed counsel's failure to file any pretrial motions irreparably prejudiced his defense. Stewart, as retained counsel, immediately joined in those pretrial motions filed by petitioner's co-defendants that could have yielded relief to petitioner, and he later filed motions for a bill of particulars, severance, production of exculpatory material, discovery, and inspection of grand jury transcripts, as well as a motion for dismissal of the indictment on the ground of prosecutorial misconduct (Tr. 215, 357-371). Stewart also received from Ornstein

copies of the voluminous documentary evidence that the government intended to introduce at trial (Tr. 206).[2] Thus, any possible deficiencies in Ornstein's representation of petitioner were corrected before trial commenced.

2. Nor was petitioner's representation by Stewart at trial ineffective. Besides general, unsubstantiated claims that Stewart was unprepared and that his technique was ineffective and offensive, petitioner's only specific allegation is that counsel's failure to file a pretrial motion challenging the sufficiency of the indictment precluded the raising of that issue on appeal (Pet. 28-31). Petitioner is incorrect. On appeal, petitioner claimed that the indictment was fatally defective because each count failed to charge an offense. The court of appeals reviewed each count and found that each was sufficient, except for Count III, which it reversed. Although counsel's failure to challenge the indictment before trial constituted a waiver of claims other than the failure of the indictment to show jurisdiction or to charge an offense (see *United States* v. *Droms*, 566 F. 2d 361, 363 (C.A. 2); *United States* v. *Busard*, 524 F. 2d 72, 73 (C.A. 5), certiorari denied *sub nom. Meyer* v. *United States*, 426 U.S. 948; Fed. R. Crim. P. 12(b)(2)), petitioner does not now show that there were other colorable claims that he was precluded from raising on appeal.

---

[2]Ornstein had, apparently before he realized that petitioner was not entitled to appointment of counsel, made informal arrangements with the United States Attorney's Office to obtain all the documentary evidence that the government intended to introduce at trial. Two boxes of materials were turned over to Ornstein (Tr. 206).

3. Finally, petitioner contends (Pet. 32-35) that Phillip Stein, his retained counsel on appeal, was ineffective because Stein's interests as a co-defendant were inconsistent with his representation of petitioner.[3] Specifically, petitioner asserts that this conflict caused Stein to ignore on appeal an issue raised at trial concerning the consistency of Stein's trial testimony with petitioner's attorney-client privilege. Petitioner, having retained Stein as his appellate counsel with full knowledge of his role in the trial, should not now be heard to claim that he was unqualified to serve because of that role. In any event, the claim has no merit.

During trial, at an extensive *in camera* hearing, counsel for Stein requested the trial court to permit Stein to testify concerning certain details of petitioner's prior consultations with Stein about petitioner's tax problems and previous convictions (Tr. 6735-6788). Petitioner's trial counsel agreed that Stein could testify about these matters in general terms. The district court reviewed the proposed testimony and issued specific rulings to ensure that petitioner's attorney-client privilege was not breached by Stein's testimony. These rulings were generally accepted by petitioner's counsel. Indeed, the court in general ruled in favor of petitioner and against Stein. As a result, when Stein testified during trial, petitioner's counsel did not assert petitioner's attorney-client privilege. Accordingly, this matter involved no viable issue to raise on appeal. Stein's failure to attempt to raise an issue totally lacking

---

[3]The propriety of Stein's representation of petitioner on appeal is an entirely separate issue from the effectiveness of that representation. The court of appeals, *sua sponte*, questioned the professional propriety of his representation and has referred the matter to the California State Bar Association (Pet. App. A7-A8). The matter is presently under review by the State Bar.

in merit is no indication that he was ineffective. See *Gillihan* v. *Rodriguez*, 551 F. 2d 1182, 1189 (C.A. 10), certiorari denied, No. 76-6815, October 3, 1977; *Harshaw* v. *United States*, 542 F. 2d 455, 457 (C.A. 8).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

APRIL 1978.

DOJ-1978-04